

## School Personnel Carrying Firearms: Civil Liability for Schools

School and Campus Safety Taskforce  
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## Existing Law: Possession of Firearms on School Grounds

- Code of Virginia § 22.1-277.07. Expulsion of students under certain circumstances; exceptions:

"In compliance with the federal Improving America's Schools Act of 1994 (Part F-Gun-Free Schools Act of 1994), a school board shall expel from school attendance for a period of not less than one year any student whom such school board has determined, in accordance with the procedures set forth in this article, to have possessed a firearm on school property or at a school-sponsored activity as prohibited by § 18.2-308.1; to have possessed a firearm or destructive device as defined in subsection E, a firearm muffler or firearm silencer, or a pneumatic gun as defined in subsection E of § 15.2-915.4 on school property or at a school-sponsored activity."

## Existing Law, cont'd

- Code of Virginia § 18.2-308.1. Possession of firearm, stun weapon, or other weapon on school property prohibited:

"If any person possesses any (i) stun weapon as defined in this section; (ii) knife, except a pocket knife having a folding metal blade of less than three inches; or (iii) weapon, including a weapon of like kind, designated in subsection A of § 18.2-308, other than a firearm; upon (a) the property of any public, private or religious elementary, middle or high school, including buildings and grounds; (b) that portion of any property open to the public and then exclusively used for school-sponsored functions or extracurricular activities while such functions or activities are taking place; or (c) any school bus owned or operated by any such school, he shall be guilty of a Class 1 misdemeanor."

### Existing Law; § 18.2-308.1, cont'd

- Exemptions (knife exemptions omitted):
  - (i) persons who possess such weapon or weapons as a part of the school's curriculum or activities; (iii) persons who possess such weapon or weapons as a part of any program sponsored or facilitated by either the school or any organization authorized by the school to conduct its programs either on or off the school premises; (iv) **any law-enforcement officer**; (vi) a person who possesses an unloaded firearm that is in a closed container, or a knife having a metal blade, in or upon a motor vehicle, or an unloaded shotgun or rifle in a firearms rack in or upon a motor vehicle; (vii) a person who has a valid concealed handgun permit and possesses a concealed handgun while in a motor vehicle in a parking lot, traffic circle, or other means of vehicular ingress or egress to the school;
- Concealed weapon permit holders are generally NOT exempt.

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### Existing Law, cont'd

- Code of Virginia § 18.2-282. Pointing, holding, or brandishing firearm, air or gas operated weapon or object similar in appearance; penalty:  
**"It shall be unlawful for any person to point, hold or brandish any firearm or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another or hold a firearm or any air or gas operated weapon in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured. However, this section shall not apply to any person engaged in excusable or justifiable self-defense. Persons violating the provisions of this section shall be guilty of a Class 1 misdemeanor or, if the violation occurs upon any public, private or religious elementary, middle or high school, including buildings and grounds or upon public property within 1,000 feet of such school property, he shall be guilty of a Class 6 felony."**

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### Existing Law, cont'd

- Code of Virginia § 18.2-280. Willfully discharging firearms in public places:  
**"If any person willfully discharges or causes to be discharged any firearm upon the buildings and grounds of any public, private or religious elementary, middle or high school, he shall be guilty of a Class 4 felony, unless he is engaged in a program or curriculum sponsored by or conducted with permission of a public, private or religious school."**

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Laws in Other States

- At least eight states currently give school boards the option of allowing armed employees in schools (many more allow armed concealed weapon permit holders on school grounds, with permission); several others have introduced legislation in this area since the Newtown shootings.
- Texas has at least one rural school division that has already allowed armed employees.
- No state currently *requires* schools to have armed employees, other than law-enforcement officers (SROs).

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CIVIL LIABILITY CONCERNS

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Injury or Death of Student, Employee, or Bystander

- Potential causes of action against the school board and its employees:
  - Wrongful death, common law assault and battery, emotional distress, negligent supervision, negligent training
- An increase in the presence of firearms, particularly in the hands of non-law enforcement individuals (with less training), could increase the risk of accidental shooting.
- Allowing non-uniformed individuals to carry firearms could also increase the risk of misidentification as assailants by law enforcement officers responding in the event of an emergency.

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### State Law: Sovereign Immunity

- State law claims: Common law sovereign immunity will protect school board members and certain employees acting within the scope of their employment from claims based in tort.
- If the employee's action is deemed *ministerial* rather than *discretionary*, the individual may be liable. For example, failing to properly store a firearm, pursuant to written school protocol, may be deemed ministerial and subject the employee to liability.
- If the employee's action is deemed to be grossly negligent, sovereign immunity will not apply.

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### Statutory Sovereign Immunity

- Code of Virginia § 8.01-220.1:2. Civil immunity for teachers under certain circumstances:  
"Any teacher employed by a local school board in the Commonwealth shall not be liable for any civil damages for any acts or omissions resulting from the supervision, care or discipline of students when such acts or omissions are within such teacher's scope of employment and are taken in good faith in the course of supervision, care or discipline of students, unless such acts or omissions were the result of gross negligence or willful misconduct."

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### Federal Law: Claims against the School Board

- 42 U.S.C. § 1983 allows a claim against a school division for depriving a citizen of a federally protected right. The deprivation would need to be caused by an official school policy or practice (like a policy allowing employees to carry firearms).

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### Federal Law: Claims against Employees

- Qualified immunity: School personnel are generally immune for actions that do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U. S. 223 (2009).
- To overcome immunity, claimant must show that the defendant violated a clearly established constitutional right of which a reasonable official should have known.
- An employee with supervisory authority and knowledge of a student's deprivation of rights who responds with deliberate indifference could be liable under § 1983.

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### Duty to Protect Students from Actions by Third Parties

- Generally, schools have no duty to protect students from harm by a third party. However, in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the Supreme Court recognized two exceptions to this rule:
  - Special Relationship: The government creates a special relationship giving rise to the duty to protect when it takes citizens into physical custody. Compulsory attendance laws **do not** create such duty. *B. M. H. v. School Bd.*, 833 F. Supp. 560 (E.D. Va. 1993); and/or
  - State-Created Danger: If the government creates the dangerous environment, it becomes responsible for protecting its citizens.

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### State-Created Danger: Case Law

- *Pinder v. Johnson*, 54 F.3d 1169 (4<sup>th</sup> Cir. 1995):
  - Plaintiff's abusive ex-boyfriend is released from prison; he threatens to kill her and her children. Police officer repeatedly assures her he will arrest the boyfriend and hold him overnight. Plaintiff returns to work; ex-boyfriend is immediately released, sets Plaintiff's house on fire and kills her three children.
  - Court: No state-created danger, because there is no special relationship between the government and the Plaintiff. The Fourth Circuit combined the two exceptions articulated in *DeShaney*.
- *McQueen v. Beecher Community Schools*, 433 F.3d 460 (6<sup>th</sup> Cir. 2006):
  - A student is fatally shot by another student while the teacher is out of the room, escorting the rest of the class down the hall.
  - Court: No state-created danger. The danger was created by the student having a gun, not by the teacher leaving the room. There was no evidence that the teacher's presence would have alleviated the harm.

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## State-Created Danger: Case Law

- *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253 (10<sup>th</sup> Cir. 1998):
  - A special education student makes suicidal statements to a school counselor. The counselor is aware that the student has access to firearms. Subsequently, the student is suspended for threatening a teacher. Against policy, the principal tells the counselor to drive the student home. The student commits suicide at home, before the parents are made aware of the suspension.
  - Court: Defendant's summary judgment motion denied; there are sufficient facts that could satisfy the 10<sup>th</sup> Circuit's state-created danger test.
- *Currier v. Doran*, 242 F.3d 905 (10<sup>th</sup> Cir. 2001):
  - Social worker transfers custody of child from mother to father. Father kills child.
  - Court: Social worker is liable because if not for the state action transferring custody, the child would be alive.

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## Columbine Lawsuit

- After the 1999 Columbine High School shooting, one of the injured students brought a § 1983 claim against several Jefferson County School District officials (among others).
- The plaintiff alleged both a special relationship and a state-created danger.
- The U.S. District Court for the District of Colorado found no special relationship simply from attending public school.
- The court applied the 10<sup>th</sup> Circuit state-created danger test articulated in *Uhlrig v. Harder*, 64 F.3d 567 (10<sup>th</sup> Cir. 1995): (i) plaintiff is a member of a limited class; (ii) substantial risk of serious, immediate, and proximate harm; (iii) obvious and known risk; (iv) conscious disregard of the risk; and (v) "conscious shocking" conduct.
- The court found defendants' failure to act did not "shock the conscience" and the risk was not immediate or proximate (as events hinting at danger occurred months before the shooting).

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## Virginia Tech Lawsuit

- Parents of two slain students filed wrongful death suit in state court, naming the Commonwealth, President Steger, and several other Virginia Tech officials as defendants (among others).
- All defendants other than the Commonwealth were eventually dismissed.
- The Montgomery County Circuit Court found that there was a special relationship between school officials and the plaintiffs which created a duty of care.
- The case went to trial, and a jury awarded the two families \$4 million each. The award was reduced, pursuant to the Virginia Tort Claims Act, to \$100,000 each.
- The Supreme Court has agreed to hear the state's appeal of the verdict.

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**Injury or Death to Armed Employee: Other Issues**

- Potential additional workers' compensation claims for injured employees.
- Will armed school personnel be added as beneficiaries under the Line of Duty Act (Chapter 4 of Title 9.1 of the Code of Virginia)?
- Will volunteers be added to qualified immunity statute? To insurance coverage?

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**PERSONNEL/MANAGEMENT CONCERNS**

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**Determining Which Employees Should Be Authorized to Carry**

- Can school division require certain employees to carry (i.e., all assistant principals), or terminate employment for refusal to carry?
- Will school reassignments be made in order to ensure an armed employee at each school?
- Will willingness to carry be considered in hiring decisions? If so, will this translate into potential discrimination claims (gender, age, disability status, religious belief)?

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### Use of Background Checks, Mental and Physical Examinations

- April 2012 guidance from the EEOC cautions that the use of criminal history checks may lead to disparate treatment based on race in hiring, in violation of Title VII of the Civil Rights Act of 1964.
- The Americans with Disabilities Act generally prohibits employers from asking about job applicants' mental/physical health.

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### Training of Employees

- The amount of training could likely affect liability.
- Training requirements may also affect insurance coverage/rates.
- What type of training would be required?
  - For instance, under the new South Dakota law, armed personnel would be required to complete 80 hours of training through the state academy in firearms proficiency, use of force, legal issues, weapon retention and storage and first aid, with an annual eight hours required to maintain qualification in subsequent years. The estimated cost to the school division is \$700 per person.
- Who would certify the training?
  - In comparison, police departments are certified as complying with relevant training standards (e.g., The Commission on Accreditation for Law Enforcement Agencies, Inc. and the Virginia Law Enforcement Professional Standards Commission).

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### Compensation of Employees

- Will armed employees be eligible for increased compensation? Stipend, or hourly, and how would the additional job duties be described? What is the expectation for these employees: are they carrying weapons as a deterrent, or are they expected to defend students/staff in an emergency?
- Will the school pay for the firearm, permit, ammunition, storage container, or training requirements?

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### Insurance Coverage

- EMC Insurance Companies, which provides liability insurance for about 90% of Kansas school districts, recently announced that it would decline coverage to schools that allow employees to carry concealed weapons.
- The Oregon School Boards Association recently announced a \$2500 annual premium for every staff member who carries a firearm.
- Some states have introduced legislation to require gun-owners to carry liability insurance.

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### Workplace Concerns

- How will the school division handle concerns of other staff members who may not want to work alongside staff members who carry weapons?
- Will staff members carrying weapons strain supervisor/supervisee relations, depending on who is allowed to carry?

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### Parental Rights

- Will parents be allowed to request class reassignments based on comfort level? Based on sincerely-held religious conviction?
- Will parents be told if their child will be in a classroom with an armed employee? This information would arguably be exempt from the Virginia Freedom of Information Act under Virginia Code § 2.2-3705.2 (7).

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